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No. 90-1133

In The

Supreme Court of the United States

October Term, 1990

EDWARD R. WYATT,

Petitioner,

v.

ROBIN S. THOMAS and
MICHAEL ANTHONY PROFFIT,

Respondents.

Petition For Writ Of Certiorari To The Circuit Court Of Smyth County, Virginia

BRIEF IN OPPOSITION OF RESPONDENT ROBIN S. THOMAS

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LIST OF PARTIES AND RULE 29.1 LIST

The petitioner in this case is Edward R. Wyatt. The respondents are Robin S. Thomas and Michael Anthony Proffit.

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OPINIONS BELOW

There are no reported opinions below.

STATEMENT OF THE CASE

This action arose out of a motor vehicle accident which occurred at or about 10:00 p.m. on Saturday, October 31, 1987 on U.S. Route 11 in Smyth County, Virginia.

As a result of the accident, a suit for property damage was brought by Edward R. Wyatt (Wyatt) personally against Robin S. Thomas (Thomas) and Michael Anthony Proffit (Proffit) in the Circuit Court of Smyth County, Virginia. The Virginia Mutual Insurance Company (Virginia Mutual), the insurer of Thomas, and Allstate Insurance Company (Allstate), the alleged uninsured motorist carrier for Wyatt, were also served with process.

At the time Wyatt's Motion for Judgment was filed, he was represented by Thomas G. Hodges, Esq. Wyatt's pleading alleged that on October 31, 1987, he gave permission to Thomas to drive "his" 1985 Lincoln Continental but advised her not to let Proffit drive the vehicle. Wyatt further alleged that Thomas, "despite plaintiff's instructions to the contrary", allowed Proffit to drive the automobile. Proffit was subsequently involved in the accident mentioned above which resulted in considerable damage to the vehicle.

Grounds of Defense were filed by Thomas, admitting that Proffit was driving the "plaintiff's vehicle" at the time of the accident, denying that the automobile accident was in any way attributed to any negligence on her part and expressly averring that Wyatt assumed the risk of damage to his property because he was guilty of negligence which proximately caused the accident. Grounds of Defense were also filed by Allstate pursuant to Va. Code Ann. § 38.2-2206 but not by Proffit.

By order entered March 14, 1989, Thomas G. Hodges, Esq., was withdrawn as counsel and David J. Hutton, Esq., was entered as attorney of record for Wyatt.

A Motion for Summary Judgment dated March 15, 1988 was filed by Thomas. The motion was based upon the fact that Wyatt did not own the damaged automobile for which he sought compensatory damages. Subsequently, Wyatt filed a Motion to Add Party Plaintiff, a Motion for Leave to Amend Motion for Judgment and a Motion for Default Judgment against Proffit. A Motion for Summary Judgment was also filed by Allstate against Wyatt on his claim against Proffit.

On May 2, 1989, all parties presented evidence and argued the respective motions before Judge Charles B. Flannagan, II. By order entered May 22, 1989, Judge Flannagan granted Wyatt's Motions to Add Party Plaintiff and For Leave to Amend Motion for Judgment and denied Wyatt's Motion for Default Judgment. In addition, Thomas' and Allstate's Motions for Summary Judgment were granted and both defendants and Allstate were given twenty-one (21) days from service to file responsive pleadings to the Amended Motion for Judgment. (Petitioner's Appendix F) *No appeal was taken by Wyatt after summary judgment was entered against him.*

An Amended Motion for Judgment styled *"Wyatt Mining Equipment, Inc.,* Plaintiff v. Robin S. Thomas and Michael Anthony Proffit, Defendants" (emphasis added) was filed and Grounds of Defense were filed by Thomas and Allstate.

The jury trial of the matter was held on September 20, 1989. Opening statements were made by counsel for Wyatt Mining and for Thomas. Counsel for Wyatt Mining Equipment, Inc. (Wyatt Mining) presented his evidence and rested. Counsel for Thomas and counsel for Allstate

then moved the Court to strike Wyatt Mining's evidence against Thomas and Proffit, respectively. The Court granted the motion to strike the evidence against Thomas, entering summary judgment in her favor, and denied the motion to strike the evidence against Proffit. The Court's decision to strike the evidence against Thomas was based upon the fact that Wyatt Mining presented no evidence during the trial which indicated that Thomas entrusted the involved vehicle to Proffit. Proffit and counsel for Wyatt Mining presented additional evidence and rested. The Court instructed the jury and Proffit and counsel for Wyatt Mining made their closing arguments. The jury deliberated and returned a verdict in favor of Proffit. An order to this effect was entered on October 10, 1989. (Petitioner's Appendix E)

A Motion to Set Aside Verdict or Award a New Trial was filed by Wyatt Mining. A hearing regarding the motion was held on October 31, 1989. Pursuant to his motion presented at that time, David J. Hutton, Esq., was allowed to withdraw as counsel for Wyatt Mining and the hearing was continued until November 29, 1989.

Subsequent to the withdrawal of David J. Hutton, Esq., as counsel for Wyatt Mining, Wyatt, the president of Wyatt Mining, assumed the "legal representation" of Wyatt Mining.

On November 29, 1989, a hearing was held on Wyatt Mining's Motion to Set Aside Verdict or Award a New Trial. Wyatt orally requested additional time to obtain an attorney to represent Wyatt Mining. The request for continuance was granted and an order to this effect was

entered by the court on January 2, 1990. Wyatt subsequently retained Joseph P. Bounds, Esq., to represent Wyatt Mining.

Wyatt Mining's post-trial motions were argued in a hearing before Judge Flannagan on January 16, 1990. A Final Order was entered on January 16, 1990 denying all of Wyatt Mining's post-trial motions and dismissing the action as to all parties with prejudice. (Petitioner's Appendix C)

Wyatt, after dismissing Joseph P. Bounds, Esq., as counsel of record for Wyatt Mining, filed another Motion to Set Aside Verdict or Award a New Trial on January 30, 1990. Concurrently, a letter was mailed to Judge Flannagan by Wyatt "moving" that he disqualify himself from any further proceedings in the case.

By letter dated January 31, 1990, Judge Flannagan informed Wyatt that he (Wyatt) was not authorized to prepare and file or take other actions on behalf of Wyatt Mining. Judge Flannagan also strongly urged Wyatt to seek legal counsel regarding a possible appeal by Wyatt Mining.

Wyatt subsequently filed a "Notice of Appeal" and "Notice of Objection to Transcript." By letter dated March 6, 1989, Judge Flannagan advised Wyatt Mining, counsel for Thomas and counsel for Allstate that Wyatt was not entitled to prepare and file pleadings on behalf of Wyatt Mining and that there were no pleadings filed requiring further action by the court. A "Petition for Appeal" dated April 10, 1990 was then filed with the Virginia Supreme Court on April 11, 1990 by Wyatt as president of Wyatt Mining.

By order entered July 31, 1990, the Virginia Supreme Court refused Wyatt Mining's Petition for Appeal. A Notice of Appeal to the United States Supreme Court and Motion to Defer Issuance Mandate, both dated August 14, 1990, were then filed by Wyatt. An Order deferring issuance of mandate to, and including, October 29, 1990 was entered by the Virginia Supreme Court on September 7, 1990.

On October 11, 1990, Wyatt mailed a petition to this court, requesting a 60 day extension to file a petition for writ of certiorari. An order granting an extension of time within which to file a petition for a writ of certiorari to, and including, November 28, 1990 was entered by this Court on October 22, 1990.

A Petition for Writ of Certiorari was "filed" by Wyatt with this Court on November 28, 1990. The petitioner was Wyatt Mining. By letter from this Court dated December 3, 1990, the petition was refused because it did not meet the form requirements of this Court and because Wyatt, a non-lawyer, was attempting to represent Wyatt Mining.

On January 11, 1991, another petition for writ of certiorari, *substantively identical to the petition "filed" on November 28, 1990 but with the substitution of Wyatt for Wyatt Mining as petitioner,* was "filed" with this Court.

REASONS FOR DENYING THE WRIT

(a) No federal questions exist in the present case and none were raised in the state court proceeding below.

This Court has jurisdiction under Article 3, Section 2, Clause 2 of the United States Constitution to review the

judgments of state courts when a party to the state court proceedings claims that a right or immunity under the laws of the United States has been denied to him. Congress implemented this constitutional grant of jurisdiction by enacting 28 U.S.C. § 1257 which empowers this Court to review certain final judgments or decrees rendered by state courts. However, this Court's jurisdiction to review a state court decision under 28 U.S.C. § 1257, whether by appeal or certiorari, is dependent upon the existence of a federal question in the case. Even assuming that Wyatt was a party to the state court proceedings in question, which he was not, no federal questions exist in the present case.

The questions presented in Wyatt's petition for writ of certiorari are ambiguous and the issues raised are impossible to discern, even with a concurrent comparison to his proposed reasons for this Court's granting of his petition. Therefore, a general but brief review of the substantive state court proceedings below seems the best method to illustrate the obvious lack of a federal question in the present case.

The occurrence giving rise to the case was an automobile accident and resulting property damage. Wyatt brought suit in a Virginia circuit court under state law theories of negligence and negligent entrustment. Summary judgment was subsequently entered against Wyatt because the vehicle involved in the accident belonged to Wyatt Mining, a separate and distinct entity. No appeal of the summary judgment ruling was taken by Wyatt.

An amended motion for judgment was filed by Wyatt Mining, alleging the same operative facts as the original

motion for judgment (with the exception of the vehicle's ownership) and pleading identical state law theories of liability. Trial of the matter was held on September 20, 1989. At the conclusion of the plaintiff's evidence and in response to a motion made by Thomas, the trial court struck the evidence against Thomas and entered summary judgment in her favor. The motion to strike and summary judgment were granted by the court because no evidence of negligent entrustment by Thomas was introduced by Wyatt Mining. The case against Proffit, on a state law negligence theory, went to the jury. After conducting their deliberations, the jury returned a verdict in favor of Proffit.

After several post-trial motions based entirely on state law were filed by both Wyatt Mining and Wyatt and hearings were held by the court on the various motions, a final order was entered on January 16, 1990. A notice of appeal was "filed" by Wyatt on behalf of Wyatt Mining and a related petition for appeal was subsequently "filed" by Wyatt on behalf of Wyatt Mining with the Virginia Supreme Court. None of the errors assigned by Wyatt Mining in its petition for appeal had as a basis a federal law issue. The petition for appeal was denied by the Virginia Supreme Court and Wyatt Mining undertook steps to petition this Court for a writ of certiorari.

After Wyatt Mining's petition for a writ of certiorari was rejected by this Court, Wyatt filed an identical petition with *himself* as petitioner. Although he now alleges various Fourteenth Amendment issues, it is quite apparent that his grounds for the granting of a writ of certiorari are but vague reincarnations of prior state law claims, thinly veiled in Fourteenth Amendment clouds.

It is well accepted that this Court will not review a decision of a state court, on appeal or through the discretionary granting of a writ of certiorari, when the underlying basis of the decision rests upon adequate and independent non-federal grounds. *Bell v. Maryland*, 378 U.S. 226, 12 L.Ed.2d 822, 84 S.Ct. 1814 (1964), *Smith v. Smith*, 366 U.S. 210, 6 L.Ed.2d 233, 81 S.Ct. 1050 (1961), *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 89 L.Ed. 2092, 65 S.Ct. 1475 (1945). Additionally, in order to obtain a review of a state court decision in this court pursuant to 28 U.S.C. § 1257, it must affirmatively appear from the record of the case that a substantial federal question was presented to the state court and ruled upon by that entity. *Webb v. Webb*, 451 U.S. 493, 68 L.Ed.2d 392, 101 S.Ct. 1889 (1981), Sup. Ct. R. 14.1(h).

From a review of the record in the present case as well as a consideration of the foregoing facts, applicable law and argument, it is obvious that the present case is devoid of any federal questions of law and that none were in fact raised in the state court proceedings below.

(b) As to Wyatt, no final judgment or decree has been rendered by the Virginia Supreme Court and his time for appeal has expired.

The review jurisdiction of this Court, delineated by the express provisions of 28 U.S.C. § 1257, depends upon the existence of a final judgment or decree rendered by the highest court of the state in which a decision could be had. If the judgment, though final, was not rendered by the highest court of the state in which a decision could be had, this Court cannot review the judgment.

Summary judgment was entered against *Wyatt* by order of the Smyth County Circuit Court entered May 22, 1989. Pursuant to the relevant provisions of Va. Code Ann. §§ 8.01-670 and 8.01-671, Wyatt had three months in which to file a petition for appeal with the Virginia Supreme court seeking appellate review of the summary judgment ruling. No petition for appeal arising out of the trial court's order of May 22, 1989 has ever been filed by Wyatt.

Wyatt as petitioner has irreversibly failed to exhaust all his opportunities for review by the courts of the Commonwealth of Virginia and has thus foreclosed any possibility of this Court granting his petition for writ of certiorari. For this Court to now grant Wyatt's petition for a writ of certiorari would be to assume that review by the Virginia Supreme Court would have been denied when in fact Wyatt elected not to pursue such a review.

(c) Wyatt has no standing to raise issues before this Court arising out of prior state court decisions in actions to which he was not a party.

Wyatt was dismissed as a party to the present suit when summary judgment was entered against him on May 22, 1989. Subsequently, Wyatt Mining was substituted as the sole party plaintiff. No appeal was taken by Wyatt as a result of the May 22, 1989 order.

To obtain relief in this Court, a complainant must show that the enforcement of a state court judgment will deprive him, as distinguished from others, of some federal right. *Liberty Warehouse v. Burley T.G. Co-Op M. Asso.*, 276 U.S. 71, 72 L.Ed. 473, 48 S.Ct. 291 (1928). Thus, even

assuming that the recent *filing* of the involved petition by Wyatt is valid, he is simply not the proper party in interest.

It is undisputed that the actual case below involved only Wyatt Mining as a party plaintiff. As reflected by the record and discussed at length elsewhere in this brief, no federal questions are involved in the present case and no such federal issues were raised in the court proceedings below. In other words, neither Wyatt, the current petitioner, nor Wyatt Mining raised a federal question in the state court proceedings. Furthermore, even if Wyatt Mining had raised a federal question in the state court proceedings, Wyatt would be precluded from relying on the federal question issue raised by Wyatt Mining and could not now invoke the appellate jurisdiction of this Court to assert the rights of Wyatt Mining. *Hanson v. Denckla*, 357 U.S. 235, 2 L.Ed.2d 1283, 78 S.Ct. 1228 (1958) reh. den. 358 U.S. 858, 3 L.Ed.2d 92, 79 S.Ct. 10 (1958).

CONCLUSION

It is obvious that the recent petition for writ of certiorari filed by *Wyatt* is but a blatant attempt to circumvent the applicable rules of this Court and evade its prior rulings. Furthermore, even if *Wyatt's* petition were to be considered by this Court, the record of the state court proceedings attest to the complete absence of any involved federal questions and reflect that the underlying state action was final as to Wyatt by order entered May

22, 1989. For the foregoing reasons, this court should deny the Petition for Writ of Certiorari.

Respectfully Submitted,

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February, 1991